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NO. 523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOHN L. LEWIS, JOSEPHINE ROCHE AND HENRY G. SCHMIDT, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Petitioners*,

v.

JOHN KOSTY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is reported at 319 F. 2nd 744. The Court of Appeals denied the Petition for Rehearing by an Order *per curiam* without Opinion (App. 35a).* The opinion of the United States District Court for the District of Columbia is unreported and is printed in the Appendix to the Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 23, 1963, and the Petition for Rehearing *En Banc* or

* The abbreviation "App." refers to the Appendix to the Petition for a Writ of Certiorari.

by the Division was denied on July 9, 1963. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Respondent, who had worked some thirty years in coal mines (namely, 1906-1924 and from 1941-1953), and who had worked beyond the designated retirement age in an applicable pension plan, was entitled upon his cessation of work to the pension he would have otherwise received (had he ceased work six month or a year or two or even three years earlier), even though the Board of Trustees had, approximately three months prior to his cessation of work, without notice to the Respondent or any other beneficiary, modified retroactively the years-of-service requirement in such a manner that the Respondent was, and would be, unable to meet the newly-adopted requirement?

STATUTES INVOLVED

In Respondent's opinion, no question is presented in this case which involves the interpretation or application of any Federal statutory provision.

STATEMENT

In view of the Statement set forth in the Petition, as well as the recital of the pertinent facts set forth in the Court of Appeals opinion at App. 4a-8a, no useful purpose would be served by including a similar statement herein.

ARGUMENT

1. The ruling of the Court of Appeals (that in failing to give notice of a change in eligibility requirements the Petitioners arbitrarily and capriciously nullified the Respond-

ent's pension rights)[1] essentially involved only the application of traditional equitable concepts concerning the administration of trust funds.[2]

With respect to the basic question of the obligation owed the Respondent, the Petition fails to establish, or even indicate, how the decision below is not in accord with decisions of this Court or is in conflict with decisions of other circuit courts of appeal or, in what manner there is presented a substantial Federal question or, indeed, any Federal question, and in the absence of such a showing we submit that review is unwarranted. What the Petitioners simply seek is further appellate review which is inconsistent with the true mission of the Supreme Court: to clarify, expound and develop the law in its most significant national aspects.

2. Plainly, none of the issues decided below involve a substantial Federal question or any Federal question at all. The Petitioners attempt to assert that there is a Federal question involved in this case by referring to Section 302(c)(5) of the Labor-Management Act, 1947, and imply-

[1] From the procedural viewpoint, also involved were issues concerning laches, the applicability of a statute of limitations to an equitable action and the discretion afforded the Court of Appeals, under 28 USC 2107, not to remand the case but to direct the entry of an appropriate judgment, as may be just under the circumstances.

[2] The Court of Appeals properly held that by failing to notify the Respondent of the pending revision of the twenty-year service requirement so as to afford him an opportunity to resign, the Trustees acted in such an arbitrary and capricious manner that, in equity and justice, the revised service requirement was declared inapplicable to Respondent. Otherwise, we reach the absurd situation that an employee's continuance at work beyond the time he is entitled to retire and receive a pension results in the loss of a pension that he would unquestionably have received had he worked less. The Court of Appeals decision avoids this situation, at least to the extent that an employee who has met the age and years-of-service requirements is given an opportunity to retire during a grace period.

ing that this is a case of first impression involving the scope of permissible authority to be exercised by Trustees under Section 302(c) of that Act. Significantly, that section has not been argued, or even mentioned, in this case up to the point of the submission of this Petition and, indeed, there is no question presented under that section. Section 302(a) makes it unlawful for any employer to pay money to any representative of his employees and Section 302(c)(5) simply renders the provisions of Section 302(a) inapplicable with respect to money paid to a trust fund established by such representative for the exclusive benefit of the employees of such employer. There is nothing in Section 302(c)(5) relative to the powers bestowed upon, or to be exercised by, Trustees of a welfare fund created pursuant to that section.

That there is no issue here concerning the violation of a provision of Sections 302(a) or (c) is recognized even by the Petitioners who point out "it is important to distinguish the case now presented from a case where Trustees are claimed to have acted contrary . . . to the Labor-Management Relations Act, 1947. No such issues are involved here." (Petition, p. 10). There is nothing in the Petition, other than the mere reference to Section 302(c), which indicates that a conflict between the Courts of Appeals exist or that a Federal, let alone a substantial Federal, question, is involved. We submit that the reference made to Section 302(c) is simply designed to afford an appearance of a Federal question for purposes of this Petition but that, in reality, only procedural questions and the application of traditional equitable principles—matters with which this Court should not be burdened—are here involved.

3. The Court of Appeals properly did not remand the case to the District Court for a retrial of issues which are either irrelevant or which, on the basis of the record, could

not possibly be resolved in any different manner. All of the contentions made or suggested in the Petition herein with respect to the need for further evidence to demonstrate the basis of the change in eligibility requirements or to establish Respondent's twenty years of service were specifically advanced by the Petitioners in their Petition to the Court of Appeals for a Rehearing *En Banc* and unanimously rejected by the full court.

a. There has never been a question presented in this case as to whether the Petitioners were vested with the discretion to promulgate and modify eligibility requirements. Concededly such discretion must be exercised equitably so as not to destroy beneficiaries' rights. It is thus not relevant for the Petitioners to present evidence now to demonstrate the basis of the change in eligibility requirements since the authority to make such change has not been questioned. Rather, the question was raised as to the manner in which such change was accomplished; in this respect, evidence to demonstrate the basis of the change is neither necessary nor helpful.

If the "facts" underlying the Petitioners' change of eligibility requirements are now deemed so vitally necessary to establish the propriety of such change, why did Petitioners neglect or refuse to introduce such evidence at the trial? All of the information concerning the foundation for the Trustees' action, namely, the circumstances, motivation, experiences, and the Trustees' expertise was available at the time of the trial and could have been introduced. Petitioners apparently now desire a retrial on a new theory since their no-notice-was-necessary position has been rejected.[3]

[3] Contrary to Petitioners' assertion, the Court of Appeals did not consider *sua sponte* notice to beneficiaries as a condition precedent to the modification of the eligibility requirements. Petitioners have

Moreover, Petitioners' argument about the necessity for protecting the trust res and the alleged financial impact which a change with notice would have entailed was argued at length in the Petition for Rehearing before the Court of Appeals and not only is unsound but irrelevant. All of Petitioners' references to "pension mills" or "synthetic coal mines" or an estimated yearly cost of 100 million dollars are made without regard to the record in this case. In this connection, it is interesting to note that Petitioners refer at length to the so-called "Douglas Report" which is not a part of the record in this case. The irony of Petitioners'

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chosen, through most of this case, to ignore the question of notice which was raised by the Respondent both in the pre-trial statement, in the evidence presented, and in closing argument. Moreover, the Respondent argued "Notice" at length in its Court of Appeals brief and thus the Petitioners had ample opportunity to demonstrate the basis of the change in eligibility requirements if they thought that such evidence was significant in justifying the taking of action without notice.

The Petitioners assert on page 10 that the Petition does not reach the issue of notice to applicants who have previously qualified. Apparently, an applicant who has previously qualified but who has not yet retired may nevertheless be entitled to a pension even though his actual cessation of work occurs after a change in eligibility requirements. Thus, the fine line is drawn that if an employee files an application but continues to work he is entitled to a pension but if an employee has not filed an application he is not, even though his entitlement is no less than that of the employee who has filed an application.

With respect to the miners who were allegedly returning to the industry just for the sake of getting a pension, we simply note in passing that these miners are in no different position from the thousands of miners who made application and received pension benefits during the first year or two after the Fund came into existence. That there may be some who during a "notice" period would file an application for a pension (having returned to the industry just for that purpose) constitutes no fair reason, we submit, to cut off arbitrarily the rights of eligibles such as Respondent, if, indeed, the Petitioners had so arranged eligibility requirements as to permit persons who returned to the industry to qualify.

reliance on this report, at this time, is overwhelming. This report, which was Respondent's Exhibit No. 9 for identification, was denied admission because of the vigorous objection made by Petitioners. Thus, it is difficult to reconcile the contention now made that the case should have been remanded so that the District Court could have a full opportunity to inquire as to the reasonableness of the change. If such were ever in issue, and we deny that it was, the opportunity for its examination by the District Court was thwarted by Petitioners' own action and they should not now be heard to complain that this aspect of the case was not satisfactorily developed.

It is equally interesting to note that the contention that a failure to change the regulations would have entailed an estimated yearly cost of at least one hundred million dollars (Petitioners' Brief, p. 17)—a contention not heretofore made—represents a modification of the contention made in the Petition for Rehearing *En Banc* that the decision of the Court of Appeals "could cause the Trust Fund to be presently depleted in the amount of over $54,000,000 and potentially in an amount of $100,000,000" (Petition for Rehearing, p. 2)—a contention which is not made in the instant Petition, presumably because its premise that "5,000 coal miners could find themselves in the same legal and factual

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What, in effect, the Petitioners are now arguing is that without any regard for the actuarial soundness of the Fund they permitted a contingent liability to arise by permitting persons entitled to pensions to continue to work and to continue to make payments into the Fund to such a point that it was dangerous to meet such an obligation and thus they had to cut off this entire group from the benefits which others similarly situated have been or will be enjoying. In any event, even if we assume the validity of the Petitioners' assertion that drastic action had to be taken to safeguard the Fund, is there any reason why this group had to be deprived completely of benefits, rather than an across-the-board cut in benefits for all persons who were beneficiaries under the Fund, as was done in 1961.

position as the Appellant Kosty" (id. at p. 8) was demonstrated to be completely erroneous for many reasons.[5]

We submit that whether the Petitioners were or were not running an actuarially sound program is not here in issue, that the motivating circumstances underlying the Trustees' exercise of their discretionary powers need not be considered, that there is no equitable reason why the Respondent should be denied his pension so that others may continue to receive theirs, and that, in any event, if the

[5] Perhaps the most significant rebuttal was found in Petitioners' statement in its successful Motion to Dismiss the Class Action which Respondent initially instituted that "Plaintiff's alleged cause of action will, both as to facts and law, be completely different from any other person claiming to be entitled to a pension from this Fund."

Moreover, if "5,000 eligibles" were indeed involved, it is curious that not a single case, to Respondent's knowledge, has been instituted involving the instant issue, or that the Union itself did nothing to protect such a large segment of its membership from such a disastrous action as that taken by the Petitioners. Moreover, the change in the Resolution occurred some ten years ago, many of the miners who may be entitled to a pension under the decision of the Court of Appeals are now dead so that either there is no continuing liability on the part of the Fund or, indeed, there has been no liability for some years or, conceivably, there may be no liability at all since applications would not be filed, in any event, for some deceased miners.

In any event, there is no sound basis for assuming that anything like five thousand claimants are involved. During the fiscal year ending June 30, 1955, which is the second "fiscal year" following the change in the Resolution and, thus, is a year in which it could normally be expected that the greatest or second greatest number of persons affected by the change in the Resolution would have filed applications, there were only 406 cases in which denials were made because the applicants furnished no proof of twenty years of classified service in the preceding thirty years. Even in the 406 cases where the applicant furnished no proof of twenty years of classified service in the preceding thirty years, it is entirely conceivable that in many of those cases the change in the Resolution would have no impact since there would be a failure to prove twenty years of classified service in any event.

Petitioners were mistaken in their policies with respect to eligibility (in terms of the financial resources of the Fund), the solution for rectification of their mistake is not to be found in permitting them to engage in an arbitrary and capricious action whereby they determine that in a group of persons having the same qualifications some are "less entitled" than others.[6]

b. Remand to the District Court for the purpose of ascertaining Respondent's employment from 1906 to 1924, would have been unwarranted and meaningless since the "evidence of Respondent's employment from 1906 through 1924 was not only uncontradicted but the Trustees expressly admitted that they had no evidence to rebut it" (App. 12a),[7] and further, in view of Petitioners' answers (filed February 17, 1961) to questions 1 and 5 posed by Appellant's Interrogatories (filed on February 7, 1961) namely,

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[6] One of the basic assumptions indulged in by Petitioners in setting forth the alleged financial impact is that all of the benefits must perforce remain the same for those persons who have been declared eligible and who have been receiving benefits during all of these years. Thus the choice posed by the Petitioners is that if you give Respondent and the alleged class similarly situated all of the benefits received by the others, then the Fund would be depleted. There is nothing sacrosanct, we submit, in the quantum of benefits received by the beneficiaries, as the Petitioners themselves made quite evident in 1961 when monthly payments were reduced from $100 to $75. The choice in 1953 was not either to cut off Respondent and others or to bankrupt the Fund. At that time (as in 1961) the same choice of reduction of benefits across-the-board for all persons who were entitled to a pension could just as readily have been made.

[7] Petitioners now assert that the reason no evidence to rebut Appellant's employment from 1906 to 1924 was submitted was that they never checked this portion of the Respondent's record (Petition, p. 19). This statement is strange in view of the statement appearing in the Pretrial Order filed on January 5, 1962, wherein the "Ds further deny that P had twenty years of service in the coal industry *at any time*". (Emphasis supplied). This denial was in

that Petitioners had no information or evidence that the Respondent was not employed in the coal industry from 1906 through 1924 and that "according to information submitted [to Petitioners], Respondent was allegedly employed as a Loader during the period" (1906-1924). It is thus clear that remanding this matter "would serve no useful purpose", as the Court of Appeals noted, since any finding to the contrary would not only be unsupported by the record but, presumably, would be reversed on review.

Petitioners had ample opportunity to meet the issue of twenty years of service in the District Court and should not now be heard to say that they were denied an opportunity to submit pertinent evidence. There was ample reason for Petitioners to contradict Respondent's testimony of service from 1906 to 1924 since there was no assurance that their position concerning the validity of the change in the Resolution would be upheld. The request now for a remand constitutes nothing more than an attempt to retry this case on some kind of a "newly discovered evidence" theory when, in fact, such evidence was either available or, in fact, does not exist.

Finally, in connection with the 1906 to 1924 period, it seems plain to Respondent that the District Court, in effect, found that the Respondent had served twenty years of service in the coal industry when it concluded "at the time of the amendment of the eligibility rules, plaintiff was not eligible for a pension in that he had not retired from or ceased work in the bituminous coal industry as required

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addition to the assertion that the Respondent was not entitled to a pension because he had not completed twenty years within the thirty-year period immediately preceding his application for a pension. Thus, Petitioners, in denying that the Respondent had twenty years of service in the coal industry "*at any time*" either must have had evidence to that effect or it can now be concluded that no such evidence ever existed and that the current statement is inaccurate.

by the eligibility rules before amendment." Clearly, such a conclusion would not have been necessary and, indeed, could not have been reached if the twenty years of service requirement had not been met. In other words, the District Court appears to be stating that the ineligibility of Respondent was predicated upon his failure to retire or cease work and the requirement to retire or cease work only comes into play after the pensioner has reached the required age and has completed the required service.

The *Marconi* case, (*Marconi Wireless Tel. Co.* v. *Simon*, 246 U.S. 46), cited by the Petitioners, is inapplicable since it is not at all "similar", as Petitioners assert; *Marconi* involved a patent infringement, in the light of a construction to be accorded a Federal statute, and the state of the record in that case was such as to make remand necessary. As this Court stated, "we are of the opinion that under the case as made by the record, the duty of applying to the issues the true meaning of the statutes cannot with safety or with due regard to the rights of the parties be now performed . . ." (246 U.S. 56). In the instant case, the record was, as the Court of Appeals found, complete and "where the evidence of record points in only one direction, as here, justice does not require this Court to remand a case for the record to be reopened." (R. App. 12a).

c. Petitioners' assertion that the defenses of laches and statute of limitations were neither argued nor briefed is completely without substance. These defenses were very much in issue (as set forth in the pre-trial statement) and, indeed, were covered by the Petitioners, at least in oral argument, at the close of the Respondent's case. Counsel for Petitioners stated that he was not waiving the statute of limitations "but I am not going to argue it too strenuously, because *I am going to concentrate primarily on the question*

of laches." (Volume 3 of the Transcript, page 376) (Emphasis supplied). During his closing argument, as set forth in Volume 5 of the transcript, page 590, Counsel for Petitioners further stated "Now, your Honor, I am not going to argue the question of the statute of limitations, and I am not going to argue the question of laches. *I think I covered it as well as I could*" (Emphasis supplied). In the light of this record, we submit that the Court of Appeal's decision properly disposed of these defenses and that it is incomprehensible for the Petitioners to assert now that they were never argued.

The choice not to brief these defenses in its initial Brief in the Court of Appeals was certainly the Petitioners' but, in any event, they were briefed by Petitioners in their Petition for Rehearing *En Banc*, which the Court of Appeals unanimously rejected. At that time, Petitioners advanced to the Court their argument that an action for a pension is divisible into two parts (Petitioners' Brief, pages 21-22). Thus, the opportunity has been available to pose this theory and the Court's rejection of it unanimously should dispose of the matter finally.*

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* The instant action is plainly an equitable action and there is absolutely no reason whatsoever why Respondent should now be constrained to bring an action at law to receive monetary payment, as Petitioners apparently urge. Plainly, if several years from now the Trustees, for no reason whatsoever should discontinue payments to Respondent, then an action at law on a debt due would have to be instituted. But that is not the instant situation. We submit that an action to establish a right to a pension is equitable in nature and that the three-year Statute of Limitations has no application to an action equitable in nature. See cases cited in the Opinion of the Court below, and *Russell* v. *Todd*, 309 U.S. 280, 289, 291 (1940); also, *Cassell* v. *Taylor*, 243 F. 2nd 259, 100 U.S. App. DC 153 (1957)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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